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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 771

ROSEMONT ENTERPRISES, INC.,

Petitioner,

—against—

RANDOM HOUSE, INC. and JOHN KEATS,

Respondents.

PETITIONER'S BRIEF IN REPLY TO THE OPPOSITION OF RESPONDENTS TO THE PETITION FOR A WRIT OF CERTIORARI

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This brief is submitted on behalf of Rosemont Enterprises, Inc. ("Rosemont"), petitioner herein, in response to the opposition of respondents Random House, Inc. ("Random House") and John Keats ("Keats") to the petition for a writ of certiorari of Rosemont.

1. Respondents assert that there is no reason to review the decision of the Court of Appeals because what is involved is not a final judgment but an "interlocutory" determination. The error of respondents' position is (a) the failure to recognize that where copyright infringement is involved the denial of preliminary injunctive relief is not merely the denial of a remedy which cannot be adequately recompensed by monetary damages, but, what is more important, a denial of preliminary injunctive relief

is a deprivation of the property in the copyright; and (b) that the Court of Appeals reversed the District Court as a matter of law, and not because it disputed the facts relied upon by the District Court in granting the injunction. The decision of the Court of Appeals on the law is thus as ripe for review as the question will ever be.

2. Respondents contend that the writ should not be granted because the opinion below contains independent grounds to support the reversal of the District Court which, it is asserted, Rosemont has not challenged and which respondents claim raise no questions worthy of this Court's attention (Respondents' Brief, pp. 8-9). However, the so-called independent grounds are merely steps in the progression which led to the decision below. What respondents' cavil amounts to, therefore, is that Rosemont did not unduly lengthen its petition by fragmentizing the decision below. However, such a course would clearly have been improper, and contrary to Rule 23 of this Court.

3. Rosemont by its petition seeks review of the decision of the Court of Appeals which includes the so-called independent grounds referred to by respondents. The decision below holds that as a matter of law—not as a matter of disputed fact as the brief of respondents implies—a preliminary injunction should not have issued to restrain respondents from the admitted copying of the Look materials. The court below reversed the District Court notwithstanding that it did not disturb the Districts Court's findings:

> (a) *As to the nature and extent of the material plagiarized and the fact that the copying by respondents was wilful and deliberate* (App. 10).

The District Court found that the amount of material plagiarized by respondents from the Look articles was

substantial and that the value of the Look article was "sensibly diminished" by the use respondents made of them (App. 14). The District Court found instances of direct copying, conceded paraphrasing, and at least twelve additional instances of paraphrase (App. 7-11). It also appears that respondents plagiarized a number of sources in addition to Look, so that the material copied from Look does not occupy a majority of the pages of respondents' book. Although the Court of Appeals found that the amount of material copied from Look does not form a major portion of the respondents' book, it did not find error in the District Court's analysis of the amount of copying which was done, nor did it overturn the District Court's finding that the copying was not *de minimis* (App. 14).

(b) *That the copyrighted* Look *material was used in substitution for independent research* (App. 15).

It is clear that Random House expected Keats to deliberately copy the material of others in lieu of engaging in an effort to uncover new material and to that end sent him the Look articles plus various material from Fortune, Time, Saturday Evening Post and others, urged paraphrasing to conceal the copying and deliberately determined not to request permission from copyright owners in the face of a recommendation by counsel that it do so.

Thus respondents made a deliberate decision to refrain from interviewing Hughes or his associates, although urged to do so, and instead relied heavily on the Look articles, which contain the last published interviews with Hughes and which Random House described as "by far the most authoritative piece [about Hughes] ever done."

(c) *That the Random House book did not copy the* LOOK *materials for purposes of criticism or comment nor is the Random House book a scholarly scientific or educational work* (App. 18).

The respondents' book makes no pretense at scholarship. It has no footnotes, no bibliography, no Index, no Acknowledgment. As one reviewer put it, the book is "an 'instant biography', the type put together with information that already has appeared in newspapers and magazines."*

(d) *That so far as this action is concerned Random House is free to publish its book so long as the book does not contain the infringing* LOOK *materials* (App. 20).

The decision below thus holds that a preliminary injunction to prevent copying is, as a matter of law, not available to restrain infringements appearing in books where there is wilful and deliberate copying, where plagiarism from works of others is done for the purpose of avoiding independent research and effort and where the copying is contained in a book which is not a scholarly scientific or educational work but a popular commercial exploitation, because the quantum of copying is insufficient to justify a restraint on a book which is subject to First Amendment protection. The question thereby raised is how much deliberate piracy must exist before a copyright owner is entitled to protection, and what standards are to be applied in determining whether there has been sufficient plagiarism.

The question whether a certain amount of studied plagiarism of copyrighted material is immune from injunction because the copying appears in a book involves at the outset a determination as to the scope of the protection

* *Kansas City Times*, May 23, 1966, p. 16B.

afforded to the press by the First Amendment. If the First Amendment, or principles derived therefrom, is to be construed as preventing the issuance of an injunction against wilful infringements then the effect on every copyright owner's property in his copyright—which depends for its existence on the willingness of a court to enforce the right to exclusivity—is immediate and real. As more fully set forth in the petition, if there is to be a balancing of constitutional rights under the First Amendment versus those of a copyright owner the balance should be struck by this Court.

Moreover, if some literary piracy is to be permitted under the First Amendment, it is appropriate that this Court set standards which all circuits may follow in determining when the piracy has reached sufficient magnitude that it will no longer be sheltered by the rights traditionally guaranteed to the press. The profession and the industry need guidance lest each application for injunctive relief in copyright cases be judged by a subjective standard. The only standard set out in the decision below is that if the infringing material forms an insubstantial portion of the whole work, preliminary injunctive relief is not available. (App. 33) Not only is this standard incomplete, it is at variance with the oft repeated principle that "no plagiarist can excuse the wrong by showing how much of his work he did not pirate." Learned Hand in *Sheldon* v. *Metro-Goldwyn Pictures Corporation*, 81 F.2d 49, 56 (2nd Cir. 1936). If this principle too is to go by the boards, this Court should take this opportunity to replace it with meaningful standards the courts may apply and the industry understand.

4. As pointed out in the petition, not since before the turn of the century has this Court addressed itself to the fair use doctrine, nor has it formulated guide lines for the lower federal courts to follow in considering when pre-

liminary injunctive relief may be denied where there is wilful and deliberate copying. Since, as more fully stated in the petition, the decision below works an extension of the fair use doctrine and establishes principles at variance with those announced by the Seventh and Ninth Circuits, a review of the decision below would permit this Court to resolve the conflict and to establish criteria by which all injunction applications in infringement cases could be governed.

Respondents urge that there is no conflict among circuits on the principle that the fair use doctrine may apply although a publisher or author hopes to achieve a profit from the sale of a book. However, it is not the fact that the Random House book is being sold for a consideration which renders the doctrine of fair use inapplicable under the test laid down by the Ninth Circuit in *Loew's, Inc.* v. *Columbia Broadcasting System, Inc.*, 239 F.2d 532 (9th Cir. 1956). Rather, it is the fact that the book is designed to be, and is, nothing more than an unauthorized exploitation of copyrighted material of others for purely commercial purposes which does not disseminate current information or give the public news. When the court below held that as a matter of law respondents' commercial purpose would not preclude a finding of fair use, it came squarely into conflict with the rationale of the *Loew's* case, and raised a question similar to that presently under consideration here in *Time, Inc.* v. *Hill*, 382 U.S. 936, *viz.*, the extent to which the press is free to invade the rights of others when the invasion serves a purely commercial end rather than purposes of a free press.

Respondents also argue that there is no conflict between the decision below and principles announced by the Seventh Circuit, notwithstanding that the decision below recognizes the existence of such a conflict (App. 42). This case clearly involves the question whether the doctrine of fair use is

applicable where the purpose of the copying is to avoid the necessity, effort and expense of engaging in independent research. The court below held the doctrine applied. The Seventh Circuit in *Toksvig* v. *Bruce Publishing Co.*, 181 F.2d 664 (7th Cir. 1950), held equally clearly that under such circumstances fair use would not apply.*

5. A further reason for granting the writ appears in the determination of the court below that in balancing the equities the copyright owner could not here prevail. In balancing the equities, the court below considered not only the assumed subjective motivation of Rosemont in seeking to enforce its copyright, rather than its motivation as copyright owner which, as the petition points out, raises questions which merit review by this Court, but also found that Rosemont was not entitled to injunctive relief because the 1954 Look articles and the plagiarizing book were not in competition with each other. The District Court found that the writings were in competition. Since the facts were not disputed, the difference between the District Court and the Court of Appeals results from a difference in the legal interpretation placed upon the nature of the competition between the infringed and infringing materials. The conclusion of the Court of Appeals that no competition is present fails to recognize (a) that one of the economic incidents of ownership of a copyright is the right to license others to copy the exclusive material, (b) that this Court has held, in analogous patent cases, that the fact that a patent owner has not used or exploited his patent does not deprive him of the right to obtain an injunction against infringement, *Continental Paper Bag Co.* v. *Eastern Paper*

* *Eisenshiml* v. *Fawcett Publications*, 246 F.2d 598 (7th Cir. 1957), does not, as respondents contend, dilute the force of the Seventh Circuit's holding in *Toksvig*. On the contrary, *Eisenshiml* reaffirms *Toksvig* and crystallizes the conflict between the principles adhered to by the court below as compared to those prevailing in the Seventh Circuit.

Bag Co., 210 U.S. 405, notwithstanding that his failure to take steps to exploit his patent indicates a lack of commercial competition between the patent owner and the infringer, and (c) that Congress has provided that a copyright, with renewal, may extend for 56 years, which is a period well in excess of that during which any publication is likely to be in active commercial competition with another publication. If copyright cases require a different rule from those established by this Court for patent cases, then because of the impact of such a holding on all copyright owners, it is appropriate that this Court establish the rule.

Conclusion

WHEREFORE, for the reasons set forth hereinabove, and in the petition, it is respectfully requested that the petition be granted.

Respectfully submitted,

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